

DOROTHY L. HEJKA
v.
U.S. MARINE CORPS

DOCKET No.
SF07528010006

OPINION AND ORDER

The appellant, Dorothy L. Hejka, was removed from her GS-3 position of Sales Store Checker in the Camp Pendleton Base commissary of the agency, the U.S. Marine Corps, based on the charge of attempted theft of government property, namely, a piece of cheese valued at \$1.68. The appellant petitioned the Board's San Francisco Regional Office for appeal of her removal, and a hearing was conducted by the presiding official designated to adjudicate the appeal.

In an initial decision rendered on March 2, 1981, the presiding official found that the removal action could not be sustained. He based this finding on his conclusions that the charge was not supported by preponderant evidence, that the agency failed to consider mitigating factors, and that the agency committed harmful error in not informing the appellant in the removal proposal that a previous reprimand had been considered in proposing the adverse action.

The agency has now filed a timely petition for review of the initial decision by the Board, asserting (1) that the presiding official erred in applying a more stringent standard than the preponderance of the evidence standard required by 5 U.S.C. § 7701(c)(1)(B); (2) that the removal penalty was justifiable as a matter of law; and (3) that the appellant failed to show how the absence of any mention in the removal proposal of the consideration given to her previous reprimand constituted harmful error under 5 C.F.R. § 1201.56(b)(1) and (c)(3). Finding that the requirements for review have been met under 5 C.F.R. § 1201.115, we hereby GRANT the petition under § 7701(e)(1).

Considering in the initial decision whether the agency had proved the requisite intent element in support of the charge of attempted theft, the presiding official weighed the appellant's explanation that, as a civilian without commissary privileges, she had placed the commissary cheese in her purse after giving \$2.00 to another employee with commissary privileges, a Bagger who was to purchase the cheese for the appellant, as against the Bagger's denial of any such transaction. The presiding official found that the appellant's testimony was more credible than the Bagger's because the appellant had a reputation for honesty in the agency and because her

explanation had been consistent throughout the proceedings, despite her initial reluctance to implicate the Bagger. The presiding official found that the Bagger's testimony was less credible because he had previously been involved in purchasing commissary items for someone without shopping privileges and he was warned that repetition of such an unauthorized transaction could lead to the loss of commissary privileges by his retired parents through whom his privileges devolved.

Citing passages from the hearing transcript, the agency argued in its petition that the presiding official overlooked certain discrepancies in the appellant's testimony that cast doubt on her credibility. The agency pointed out that when the appellant was first apprehended with the cheese in her purse she said that she was going to have someone pay for it, whereas she later testified that she had given the money to the Bagger before she put the cheese in her purse. Hearing Transcript at 10, 49-50. Moreover, the agency emphasized, the Bagger had left the commissary for the day before the appellant had even selected the cheese. *Id.* at 11, 40. The appellant's testimony regarding the course of events on the day in question indicated that she gave the Bagger \$2.00 early in the afternoon, intending to select the cheese close to closing time so it would not spoil before she got it home, and to tell the Bagger the price of the cheese she selected afterward, so that he could then tender the correct amount to another Checker. *Id.* at 50-53. The appellant explained, further, that she was unaware the Bagger had left for the day when she selected the piece of cheese and put it in her purse. *Id.* Thus, we find no discrepancy because the appellant testified that she did give the Bagger \$2.00 for the cheese with the understanding that the Bagger was going to pay for it with that money, but the Bagger did not pay for the cheese because he left for the day, unbeknownst to the appellant, before she selected the package of cheese she wanted.

The agency also argued in its petition that the presiding official overlooked the fact that in clearly separate steps the appellant first placed the cheese under her checkstand, then in a paper bag, and finally into her purse, suggesting by the deliberateness of the acts that the appellant intended to conceal her intended theft. *See id.* at 8-9, 24. We agree with the presiding official's implicit determination that this fact has little bearing on the appellant's intent because she could have been too busy at her checkstand to concentrate on her purchase and complete all of the steps at one time, or she could have intended the separate steps in order to avoid detection of the unauthorized purchase of a commissary item through someone with commissary privileges.

The agency argued, additionally, that the presiding official erroneously found that the Bagger learned of the incident on the evening

after it occurred from his brother, who was also a Bagger, whereas the testimony reflects that he became aware of it only upon return to work the following day. *Id.* at 45. We note that the presiding official did err in this respect, but we find that the error is not prejudicial because the presiding official correctly concluded in any event that the Bagger learned he had been implicated in the incident before he was questioned by agency officials. See *Karapinka v. Department of Energy*, 6 MSPB 114, 115 (1981).

The remaining points that the agency raised relating to credibility were expressly considered by the presiding official in his initial decision. In keeping with our holding in *Weaver v. Department of the Navy*, 2 MSPB 297, 299 (1980), we shall accord due deference to the reasonable assessment of the testimony by the presiding official who was present to hear and observe the demeanor of the witnesses. We find, therefore, that the presiding official correctly concluded that the agency failed to prove it was more likely true than not true that the appellant attempted to steal the cheese. 5 C.F.R. § 1201.56(a) and (c)(2).

Since 5 U.S.C. § 7701(c)(1)(B) mandates that the agency's removal action cannot be sustained when it is not supported by preponderant evidence, the remaining issues of the appropriateness of the penalty, as well as possible harmful error in failing to mention in the removal proposal that a previous reprimand was considered in proposing removal, are rendered moot. See *Hatler v. Department of the Air Force*, 3 MSPB 406, 407-08 (1980). As a consequence, those issues need not be resolved in the context of this appeal, and we shall not consider them here.

Accordingly, the initial decision dated March 2, 1981, is hereby **AFFIRMED**, and the agency is **ORDERED** to cancel the removal action against the appellant and to furnish the San Francisco Regional Office with documentation of compliance with this order within ten (10) days of its receipt by the agency.

This is the final decision of the Merit Systems Protection Board in this appeal. The appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after the appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., December 2, 1981